MOTION FILED
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-419

VERMONT YANKEE NUCLEAR POWER CORPORATION,
Petitioner,

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., *et al.*,
Respondents.

MOTION FOR LEAVE TO MAKE POST-ARGUMENT FILING AND SUGGESTION OF MOOTNESS AND MOTION TO DISMISS WRIT OF CERTIORARI AS IMPROVIDENTLY GRANTED

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MOTION FOR LEAVE TO MAKE POST-ARGUMENT FILING

During oral argument the Court addressed a number of questions to the parties concerning whether the Court's decision in this case could affect the license for the Vermont Yankee facility. We felt that issue was not clearly presented to the Court at that time. In order to set the issue clearly before the Court with all relevant facts, we request leave to file the attached Suggestion of Mootness and Motion to Dismiss Writ of Certiorari as Improvidently Granted.

Respectfully submitted,

RICHARD E. AYRES

Attorney for Respondents
Natural Resources Defense Council, Inc.
New England Coalition on Nuclear Pollution

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SUGGESTION OF MOOTNESS AND MOTION TO DISMISS WRIT OF CERTIORARI AS IMPROVIDENTLY GRANTED

During oral argument the Court addressed a number of questions to the parties concerning whether the Court's decision in this case could affect the license for the Vermont Yankee facility. We felt that issue was not clearly presented to the Court at that time and are filing this memorandum to address the issue fully.[1] Because it is

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[1] As the Court will see, all of the facts pertinent to this issue were know by September 16, 1977. Clearly the question of the mootness of the Vermont Yankee proceeding and the motion being filed today to dismiss the writ of certiorari as improvidently granted should have been brought to the Court's attention before now. Although all parties have an equal obligation to focus the Court's attention on possible mootness, respondents accept greater responsibility, for respondents are the parties who have opposed certiorari. Nonetheless, in light of the Court's clearly evinced interest in the mootness question at oral argument and the continuing obligation of members of the bar of this Court, we believe it far better to be tardy than totally to ignore this question.

clear that whether this Court affirms or reverses the decision of the court below it will not affect the Vermont Yankee license, we move that the writ of certiorari be dismissed as improvidently granted.

The Court of Appeals' decision adjudged two issues, in two consolidated cases: (1) whether a nuclear power station (Vermont Yankee) could be licensed by the Commission without any consideration of the adverse effects on the environment of the wastes generated by the plant;[2] and (2) whether the Commission had adequately addressed these effects in a later "generic rulemaking" proceeding.[3] Petitions for review of the lower court's decision in each case were filed with the Court, but a writ was granted only with respect to the Vermont Yankee case.[4] Thus, the only ruling of the Court of Appeals before the Supreme Court is the lower court's ruling that the Commission erred in granting an operating license to Vermont Yankee without any consideration of the environmental effects of Vermont Yankee's waste products.[5]

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[2] *Natural Resources Defense Council, Inc. and New England Coalition on Nuclear Pollution, Inc.* v. *U.S. Nuclear Regulatory Comm'n.* (Vermont Yankee), Civ. No. 74-1385 before the Court of Appeals.

[3] *Natural Resources Defense Council, Inc. and Consolidated National Intervenors, Inc.* v. *U.S. Atomic Energy Commission*, Civ. No. 74-1586 before the Court of Appeals.

[4] Petitioner Vermont Yankee petitioned for review of the Court of Appeals ruling on the first issue (No. 76-419, granted); Nominal respondent Baltimore Gas and Electric Co. petitioned for review of the Court of Appeals decision on the second issue (No. 76-548, not granted); a petition for certiorari was also filed and granted in *Consumers Power Company* v. *Nelson Aeschliman* (No. 76-528, granted), which involved, *inter alia*, the same issue as the Vermont Yankee proceeding. App. 109.

[5] Petitioners have assumed that this case presents for review the issue of the adequacy of the procedures used in developing the original S-3 regulation. That issue arises out of the decision of the court below in which certiorari was not granted; the NRC has rescinded that original S-3 regulation; the new S-3 regulation proceeding utilizes procedures which differ from those involved in the original S-3 rulemaking. 42 Fed.Reg. 26989 (May 26, 1977). Thus, what is sought from this Court is an advisory opinion on the adequacy of procedures used to develop a record as the basis for rulemaking with respect to a rule which is no longer applicable to any nuclear power plant and whose previous application to nuclear power plants failed to produce a single Petition for Review from an owner of those plants. Whether or not procedures now being used to develop the final S-3 regulation are adequate will be directly dependent on the facts of that case and any party that believes the procedures are too extensive should either have challenged the order establishing the procedures or should challenge the final regulation. What cannot be done is to freight the Vermont Yankee proceeding with the issue and obtain this Court's advice outside a real case or controversy.

Following the decision of the Court of Appeals, the Commission promulgated an interim S-3 Table rule pending completion of a new rulemaking to produce a final S-3 Table rule and directed that it be made applicable to new licenses and retroactively to certain already-issued licenses including the Vermont Yankee operating license. *Vermont Yankee Nuclear Power Corporation* (Vermont Yankee Nuclear Power Station), *et al.*, CLI-77-10, 5 NRC 717 (April 1, 1977). Vermont Yankee did not appeal that decision. On April 18, 1977, at the request of the respondent New England Coalition on Nuclear Pollution, the Commission applied the interim S-3 Table values to the Vermont Yankee plant and concluded that even with those values included as costs of the plant, the plant's operation should continue. *Vermont Yankee Nuclear Power Corporation* (Vermont Yankee Nuclear Power Station), ALAB-421, 6 NRC 25 (July 18, 1977). Vermont Yankee did not appeal the addition of the interim S-3 Table costs to its environmental cost/benefit analysis.

It is critical to understand that the application of the interim S-3 Table values to Vermont Yankee has had no impact on its operating license. Although the interim

S-3 Table does have an 18-month duration which expires on September 14, 1978, the expiration does not affect the validity of any license to which the interim S-3 Table values have been applied. 42 Fed.Reg. 13803, 13806 (March 14, 1977). Rather, as the interim regulation clearly states, at the expiration of the 18-month period the S-3 Table values may not be applied to any *new* licensing proceedings (*Id.*):[6]

> "The values set forth in Table S-3 in this paragraph will not be applied in any proceeding as of September 14, 1978."

The assertion by counsel for Vermont Yankee at oral argument that his client now has an 18-month license when it previously held a 40-year license is not correct. It continues to hold a 40-year operating license from the Commission subject to the same limitations and conditions to which all Commission licenses are subject.[7]

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[6] Even this time limit is of dubious relevance because the Commission indicated that it would be extended for good cause, which the Commission would presumably determine existed if it had not yet completed the procedures to adopt a final S-3 Table rule. 42 Fed.Reg., *supra*, at 13806.

[7] Vermont Yankee's original full-power operating license was issued on October 11, 1972, pursuant to Section 192 of the Atomic Energy Act (42 U.S.C. § 2242). It was a temporary operating license which was to expire by statute no later than October 30, 1973. On February 28, 1973, the Commission issued a full-term, full-power operating license. That license contained several conditions, including the following (*In the Matter of Vermont Yankee Nuclear Power Corporation* (Vermont Yankee Nuclear Power Station), NRC Docket No. 50-271, LBP-73-8, 6 AEC 149 (1973)):

> This license . . . is subject to all applicable provisions of the Act and to the rules, regulations, and orders of the Commission now *or hereafter in effect*; . . . . (Emphasis added.)

Since the date of issuance, the Vermont Yankee license has been amended 35 times, some of which amendments affected Vermont Yankees' authority to operate the plant. For instance, one of those amendments, imposed by the Commission, required the plant to operate at only 75% of its rated power pending resolution of an important safety issue. *Vermont Yankee Nuclear Power Corporation*

When the Commission replaces the interim S-3 Table with a final S-3 Table, the final rule will be applicable to Vermont Yankee and, upon the request of an interested party, the Commission will once again reconsider the Vermont Yankee operating license. However, that action will be taken not because of the decision of the court below nor will it be affected by any decision of this Court.

In its brief, the Commission has already declared that regardless of the outcome of this case the Commission intends to complete its S-3 Table rulemaking and adopt a final S-3 Table regulation.[8] Govt. Br., p. 37, fn. 36. Thus, even if this Court reverses the decision of the court below, the Commission application of the interim

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(Vermont Yankee Nuclear Power Station), ALAB-141, 6 AEC 576 (August 22, 1973). That prohibition was subsequently lifted when the safety issue was deemed resolved. *Vermont Yankee Nuclear Power Corporation* (Vermont Yankee Nuclear Power Station), LBP-74-8, 7 AEC 128 (January 22, 1974). The application of the interim S-3 rule to Vermont Yankee did not result in any amendment to the Vermont Yankee license and that license still includes the following provisions:

> "Vermont Yankee is authorized to operate the facility at reactor core power levels not to exceed 1593 megawatts thermal [full-power] in accordance with the Initial Technical Specifications (Appendices A and B) appended hereto.
>
> * * * *
>
> "This license is effective as of the date of issuance and shall expire at midnight on December 11, 2007 [40 years from issuance of the original construction permit]." (Brackets added.)

[8] Pursuant to Section 186(a) of the Atomic Energy Act (42 U.S.C. § 2236) and to 10 CFR § 50.100, the NRC is authorized to revoke, suspend or modify any operating license, when, *inter alia*, a fact or report is revealed which if known when the license was originally issued would have warranted the action now being taken. Thus, there is no question of the authority of the Commission to revise the S-3 Table values and apply them retroactively to a facility which has already been licensed. The Vermont Yankee case was litigated because of the Commission's refusal to exercise that authority. It has now agreed to exercise that authority irrespective of the outcome of this case.

rule to Vermont Yankee which requires that the environmental effects of Vermont Yankee's wastes be factored into the environmental impact statement for the plant will still apply, and when the Commission replaces the interim rule with a final rule that rule will also be applicable to Vermont Yankee.

If Vermont Yankee is aggrieved by the NRC actions, it has, or had, full recourse. If it believes no interim S-3 regulation should have been applicable to it, it should have appealed the order authorizing that application or the order making that application. If it believes no final S-3 Table regulation should apply to it, it should have either challenged the order making the interim S-3 Table regulation applicable to it which in effect announced that policy or should challenge subsequent actions to be taken by the Commission in adopting the final S-3 Table regulation and making it applicable to Vermont Yankee. For this Court to now decide the case before it is to decide an issue which it is too late to raise (Vermont Yankee did not challenge the application of the interim S-3 Table to it) or too early to raise (Vermont Yankee has not yet had the final S-3 Table applied to it).

Vermont Yankee and the NRC have acquiesced in the principle that the Vermont Yankee operating license should be subject to re-examination in light of the Commission conclusions about the environmental effects of reprocessing and waste disposal. That is the only issue which was raised by the decision below. There is no basis for this Court to exercise its certiorari powers where, as here, there is no genuine case or controversy presented.

CONCLUSION

For the foregoing reasons, we urge the Court to dismiss the writ of certiorari as improvidently granted.

Respectfully submitted,

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Natural Resources Defense Council, Inc.
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December 1, 1977